Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

A Massachusetts statute limits the authority of state agencies (but not private persons) to buy goods and services from persons who do business with Burma. This type of law is known as a "selective purchasing law." The questions presented are:

1. Whether economic sanctions against Burma enacted by Congress in 1996 -- three months after enactment of the Massachusetts Burma Law -- implicitly permit, or preempt, state and local selective purchasing laws regarding Burma.

2. Whether selective purchasing laws such as the Massachusetts Burma Law represent "market participation," not regulation, and are therefore exempt from claims based on the Foreign Commerce Clause and the foreign affairs power of the federal government.

3. Whether selective purchasing laws such as the Massachusetts Burma Law unconstitutionally interfere with the power of the federal government to conduct foreign affairs.

4. Whether selective purchasing laws such as the Massachusetts Burma Law discriminate against foreign commerce in violation of the Foreign Commerce Clause.

PARTIES TO THE PROCEEDING

The plaintiff is National Foreign Trade Council, Inc. (NFTC). According to the NFTC, it is a " nonprofit corporation; it issues no stock and has no parent corporations, subsidiaries or affiliates." The defendants are Andrew S. Natsios, the Secretary of Administration and Finance of the Commonwealth of Massachusetts and Philmore Anderson, III, the state purchasing agent of the Commonwealth of Massachusetts. The defendants are sued solely in their official capacities.

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No.

IN THE

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OCTOBER TERM, 1999

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rules 12, 13, and 14, defendants Andrew S. Natsios, Secretary of Administration and Finance of the Commonwealth of Massachusetts, and Philmore Anderson, III, State Purchasing Agent, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on June 22, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 181 F.3d 38 (1st Cir. 1999) and is reproduced in the separately bound appendix to this petition. The decision of the United States District Court is reported at 26 F. Supp.2d 287 (D. Mass. 1998) and is also reproduced in the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1999. Pet. App. 74. No rehearing or rehearing *en banc* was sought. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Plaintiff invoked and the court of appeals found jurisdiction pursuant to 28 U.S.C. § 1291. Petitioner no longer contests the standing of plaintiff to maintain this case. *See* Pet. App. 14 n.6.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 8

The Congress shall have Power . . . [t]o provide for the common Defence . . .; [t]o regulate Commerce with foreign Nations . . . ; [t]o establish an uniform Rule of Naturalization . . . ; [t]o define and punish . . . Offences against the Law of Nations . . . ; [and] [t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . .

United States Constitution, Art. I, § 10

No State shall . . . enter into any Treaty, Alliance, or Confederation [or] grant letters of Marque or Reprisal . . . [or] without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing [its] inspection Laws . . . . No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Constitution, Art. II, § 2

The President shall be Commander in Chief . . . [and] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors . . . .

United States Constitution, Art. II, § 3

[The President] shall receive Ambassadors and other public Ministers . . . .

United States Constitution, Art. III, § 2

The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Mass. Gen. Laws Ann. ch. 7, §§ 22G-22M

The full text of Mass. Gen. Laws Ann. (M.G.L.A.) ch. 7, §§ 22G-22M (West 1999 Supp.), appears at Pet. App. 88-94. Excerpts from the same sections appear in the Statement of the Case, below.

STATEMENT OF THE CASE

1. Procedural History

Plaintiff National Foreign Trade Council (NFTC) filed its complaint on or about April 30, 1998. The parties filed a stipulation of facts, cross-motions for summary judgment, and uncontested affidavits. Pet. App. 13-14. No party argued that a material fact was in dispute.

On November 4, 1998, the district court entered a memorandum and order granting summary judgment for the NFTC. Pet. App. 13-14, 75. The district court found that the Massachusetts Burma Law was not preempted by federal law, stating that the NFTC had "failed to carry [its] burden" to show preemption and that the "evidence does not establish sufficient actual conflict for th[e] court to find implied preemption." *Id.* at

85-86 (citation omitted). Nevertheless, the district court held that the Burma Law "impermissibly infringes on the federal government's power to regulate foreign affairs." *Id.* at 77. Quoting *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968), the court stated that the Massachusetts Burma Law "has more than an indirect or incidental effect in foreign countries" and a "great potential for disruption or embarrassment." Pet. App. 81. The sole evidence of "disruption or embarrassment" cited by the district court was the withdrawal of three companies from Burma and protests against the law filed by the European Union, the Government of Japan, and the Association of South East Asian Nations. Pet. App. 81-82. The district court did not reach the claim by the NFTC under the Foreign Commerce Clause. *Id.* at 86. On November 17, 1998, the court entered final judgment.

Petitioners timely appealed to the court of appeals, which affirmed. The court of appeals first noted that the parties "agreed" that "human rights conditions" in Burma "are deplorable." Pet. App. 5. The court nevertheless held that (1) "the law interferes with the foreign affairs power of the federal government"; (2) the law represents regulation, not market participation, and violates the Foreign Commerce Clause; and (3) the law "violates the Supremacy Clause because it is preempted by federal sanctions against Burma." *Id.*

The court summarized its decision as follows: "The passage of the Massachusetts Burma Law," the court said, "has resulted in significant attention being brought to the Burmese government's human rights record." Pet. App. 73. "Indeed, it may be that the Massachusetts law was a catalyst for federal sanctions." *Id.* "Nonetheless, the conduct of this nations's foreign affairs cannot be effectively managed on behalf of all of

the nation's citizens if each of the many state and local governments pursues its own foreign policy." *Id.* "Absent express congressional authorization," the court concluded, "Massachusetts cannot set the nation's foreign policy." *Id.*

2. Facts

A. The Massachusetts Burma Law

The Massachusetts Burma Law limits the procurement of goods and services by Massachusetts state agencies from persons who do business with Burma. The Burma Law was enacted in July, 1996, Mass. St. 1996, c. 130, and entitled "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)." The Act is codified at M.G.L.A. c. 7, §§ 22G-M.

According to the United States Department of State, the "people of Burma continue to live under a highly authoritarian military regime that is widely condemned for its serious human rights abuses." 1st Cir. App. 336. In the months following enactment of the Massachusetts Burma Law in 1996, the United States, the European Union, and other countries imposed economic sanctions on Burma. *Id.* at 338, 342-48.

The Massachusetts Burma Law effectively requires state agencies to increase by 10 percent the price of offers to sell goods and services to the Commonwealth submitted by companies that do business with Burma. M.G.L.A. ch. 7, § 22H(d). The Law applies equally to state purchases of goods and services from persons domiciled in Massachusetts, other States, and foreign countries. The Burma Law does not apply to the purchase of

goods or services by private persons or prohibit contact between private persons and the Government of Burma.

Subject to certain exceptions, the Burma Law provides that "a state agency, a state authority, the house of representatives or the state senate may not procure goods or services from any person listed on the restricted purchase list maintained by the secretary [of administration and finance], or who is determined through affidavit or through other reliable methods to meet the criteria for so being listed." M.G.L.A. ch. 7, § 22H(a). By its terms, the statute imposes "preference requirements" (§ 22I) rather than an absolute prohibition on state contracting with companies doing business in Burma. Thus, exceptions are authorized when the procurement is "essential" and enforcement of the restriction would "eliminate the only bid or offer, or would result in inadequate competition[,]" § 22H(b)(1) and (2); when the State is purchasing certain kinds of medical supplies, § 22I; or when there is "no comparable low bid or offer" by a bidder who is not on the list. § 22H(d). A "comparable low bid or offer" is defined as "a responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service." § 22G. In practice, the "comparable low bid or offer" provision is applied by adding 10 percent to offers made by persons determined to be doing business with Burma. Pet. App. 7-8.

Section 22J(a) provides that the "secretary shall establish and maintain a restricted purchase list . . . [which] shall contain the names of all persons currently doing business with Burma (Myanmar)." "Doing business with Burma" is defined by § 22G as: "(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar)

or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary licensee or franchise[e] of such a person; (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement; (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar); (d) providing any goods or services to the government of Burma (Myanmar)." Under sections 22H(e) and 22I, persons with operations in Burma limited to the "reporting the news" or providing goods or services "for the provision of international telecommunications," or "providing only medical supplies" are exempt from the restrictions of the Act.

The Act directs the Secretary of Administration and Finance (the Secretary), "[i]n establishing the restricted purchase list," "to consult United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources." § 22J(b). "The Secretary shall also place the name of any person [on the list] who, in the statement [submitted to state agencies under section 22H], declared that he meets the criteria for being so listed." *Id.*

B. Federal Legislation Concerning Burma

Three months after Massachusetts enacted its Burma Law,

Congress authorized federal sanctions against Burma. *See* Pet. App. 10-12. The Omnibus Consolidated Appropriations Act of 1997 (the Federal Burma Law), Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 through 3009-167 (Section 570), approved September 30, 1996, imposed conditional sanctions on Burma "[u]ntil such time as the President determines and certifies to Congress that Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government. . . ." § 570(a). The sanctions include an end to most bilateral assistance (§ 570 (a)(1)) and the opposition by the United States to most multilateral aid. *Id.* at § 570(a)(2).

Section 570 also authorizes and directs the President "to prohibit . . . United States persons from new investment in Burma, if [he] determines and certifies to Congress that, after the date of th[e] Act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung San Suu Kyi or has committed large-scale repression of or violence against the Democratic opposition." *Id.* at § 570(b). "New investment" is defined by the Act to include "the economical development of resources located in Burma" but does "not include the entry into, performance of, or financing of a contract to sell or purchase goods, services or technology." *Id.* at § 570(f)(2).

The Act further directs the President to "seek to develop, in coordination with members of the Association of Southeast Asian Nations (ASEAN) and other countries having major trading and investment interests in Burma, a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Law and Order Restoration Council (SLORC) and democratic opposition groups

within Burma." *Id.* at § 570(c).

Finally, the Act requires the President to submit reports every six months to certain Congressional committees on: "(1) progress toward democraticizationin Burma; (2) progress on improving the quality of life of the Burmese people . . .; and (3) progress made in developing the [multilateral] strategy referred to in subsection (c) ['to bring democracy to and improve human rights practices . . . in Burma']." *Id.* at § 570(d).

C. Federal Executive Action Concerning Burma

On October 3, 1996, the President issued a proclamation entitled "Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Formulate or Implement Policies That Are Impeding the Transition to Democracy in Burma or Who Benefit from Such Policies." Proclamation No. 6925 (Oct. 3, 1996), 61 Fed. Reg. 52,233, 1996 U.S.C.A.A.N. at A83. The President stated that the "current regime in Burma continues to detain a significant number of duly elected members of parliament, National League of Democracy activists, and other persons attempting to promote democratic change in Burma." *Id.* The President further stated that the "regime has failed to enter into serious dialogue with the democratic opposition and representatives of the country's ethnic minorities . . . and has failed to meet internationally recognized standards of human rights." *Id.*

Seven months later, the President issued an Executive Order implementing section 570. Exec. Ord. 13047, 62 Fed. Reg. 28,301 (1997). In the Order the President "determine[d] and certif[ied] that, for purposes of [Section 570(b)], the Government

of Burma has committed large-scale repression of the democratic opposition in Burma after September 30, 1996, and further determine[d] that the actions and policies of the Government of Burma constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and declare[d] a national emergency to deal with that threat." *Id.* Accordingly, the President "prohibit[ed] new investment in Burma by United States persons . . . ," subject to certain exceptions. *Id.*; *see also* 1st Cir. App. 338 (summarizing earlier unilateral United States sanctions, including "suspending economic aid, withdrawing GSP [General System of Preferences] . . . , implementing an arms embargo, blocking assistance from international financial institutions, downgrading our representation [from ambassador to charge d'affaires], and imposing visa restrictions on senior regime leaders and their families").

REASONS FOR GRANTING THE WRIT

For more than two hundred years, citizens of Massachusetts and other States have used boycotts to support the "natural, essential, and unalienable rights" of people around the world. *See* Mass. Const. of 1780, Pt. 1, art. 1 (West 1997 ed.); Charles McLean Andrews, *The Boston Merchants and the Non-Importation Movement* 17, 33-34, 40-41, 43, 55 (1968). The Massachusetts Burma Law closely resembles private boycotts and the scores of divestment and selective purchasing laws enacted by state and local governments in the 1980s concerning South Africa. The Massachusetts law is also similar to many current state and local laws and resolutions concerning Northern Ireland,

Cuba, Switzerland, and Nigeria -- laws and resolutions now at risk in light of the broad ruling of the court below.

Nothing in our federal Constitution denies to the States the right to apply a moral standard to their spending decisions. Not one constitutional grant, prohibition, or command requires the States to trade with dictators. In an era of global procurement and trade, state spending decisions will inevitably rile foreign countries and even risk embarrassment to the United States. These commonplaces, however, are not adequate grounds for constitutional judgments against selective purchasing laws. State laws that threaten national interests may be addressed by Congress, "whose voice, in th[e] area [of foreign affairs], is the Nation's." *Barclays Bank v. Franchise Tax Board*, 512 U.S. 298, 331 (1994). Absent clear and valid preemption of state law by Congress, the States should be free to choose their trading partners and indirectly seek to "secure the blessings of liberty" around the world. U.S. Const., Preamble.

I. THE CONSTITUTIONALITY OF SELECTIVE PURCHASING LAWS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Scores of Selective Purchasing and Similar Laws Enacted in the 1980s and 1990s Show the National Importance of the Questions Presented.

In this case "a United States court of appeals has decided an

important question of federal law that has not been, but should be, settled by this Court . . . ." United States Supreme Court Rule 10(c). The court of appeals acknowledged the national interest in the question presented. According to the court below, "[a]t least nineteen municipal governments have enacted analogous laws restricting their purchases from companies that do business with Burma. In addition, local jurisdictions have enacted similar laws relating to China, Cuba, Nigeria, and other nations." Pet. App. 10; *see, e.g.*, New York City Admin. Code § 6-115.1 (Northern Ireland); § 6-115 (Burma); Los Angeles Admin. Code §§ 10.38 *et seq.* (Burma); San Francisco Admin. Code, Ch. 12J (Burma); Philadelphia Code § 17-104(b) (Burma); Mass. Gen. Laws Ann. ch. 22C-22F (West 1996 ed.) (Northern Ireland); Florida Stat. Ann. §§ 215.471 and 215.472 (Cuba); Vermont J.H.R. 157 (Joint Resolution Supporting National League for Democracy in Burma); Vermont Acts of 1999, ch. 13 (requiring state pension funds to support certain shareholder resolutions concerning business done in Burma). The court below noted further that "Massachusetts is not alone in its views regarding Burma and there is great potential for the proliferation of similar statutes." Pet. App. 24.

Selective purchasing laws have a long pedigree. In the New England and other colonies, the founding generation considered the nonimportation boycott to be a wise alternative to war. *See* Andrews, *supra*; James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 Pa. L. Rev. 287, 330-35 (1990). In the 1980s, scores of state and local governments boycotted companies that did business with South Africa. Ultimately, twenty-three States and eighty cities enacted divestment or procurement laws intended to

promote human rights in South Africa. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 Am. J. Int'l Law 821, 822 (1989); *Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72, 562 A.2d 720, 744-49 (1989) (upholding constitutionality of divestment ordinance), *cert. denied*, 493 U.S. 1093 (1990); 10 Op. Off. Legal Counsel 49 (1986) (upholding state and local divestment and selective purchasing laws). During the same period, "Buy American" laws were enacted by approximately forty States, despite criticism by foreign countries and firms. *See Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990) (upholding Pennsylvania "Buy American" law), *cert. denied*, 501 U.S. 1212 (1991).

This long pedigree reflects the historic power of state and local governments to decide "with whom [they] will deal." *Reeves v. Stake*, 447 U.S. 429, 439 (1980) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). The recurring use of selective purchasing and similar laws shows that this case should be resolved by this Court.

B. The Recent Rise in Global Commerce and International Trade Agreements Heightens the Need for Review of Claims that State Laws Unconstitutionally Interfere with Foreign Commerce and Foreign Affairs.

The importance of this case is underscored by increasing global commerce and a new generation of trade agreements.

Foreign trade has increased dramatically in recent years; improvements in communications and transportation have married the States to foreign firms and countries, for better or worse. Countless state and local laws now significantly affect foreign traders and investors. *See* Louis Henkin, *Foreign Affairs and the Constitution* 150 (1996 ed.).

Meanwhile, the United States has entered a new generation of agreements governing international trade and procurement. *See* North American Free Trade Agreement (NAFTA) Implementation Act, P.L. 103-182, 107 Stat. 2057 (1993), 19 U.S.C. §§ 3301 *et seq.*; Uruguay Round Agreement Act of 1994 (URAA), P.L. 103-465, 108 Stat. 4809, 19 U.S.C. § 3501 *et seq.* Under these agreements, Congress has purported to subject state laws to review by international bodies. Agreement Establishing the World Trade Organization (WTO), Annex 1B, art. 1, 33 I.L.M. 1144 (1994), 1169; 1994 U.S.C.A.A.N. at 4052; 19 U.S.C. § 3312 (NAFTA). Foreign countries have targeted dozens of state laws for attack. *See* European Commission, *Report on Barriers to Trade and Investment in the United States* (1997). The possibility of adverse action against the States under the GATT "impose[s] considerable new burdens and vulnerabilities" on the States. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1267 n.156 (1995). These burdens and vulnerabilities will increase dramatically if courts may rely on mere trade *complaints* as the basis for constitutional judgments against state laws.

In this case, the European Union and Japan have challenged the Massachusetts Burma Law under the GATT at the WTO. Pet. App. 10, 20, 24. Despite the fact that Congress has denied a

private right of action to enforce GATT in the courts of the United States (*see* 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1); 1994 U.S.C.A.A.N. at 4055), and the United States Trade Representative has pledged a strong defense of the Massachusetts law at the WTO (1st Cir. App. 425), the court below expressly based its constitutional holdings on the complaints made by the European Union and Japan. Pet. App. 24-26. The court's reliance on trade complaints -- inevitable rows in an era of global procurement -- grants to foreign countries and firms a "heckler's veto" against state laws. Absent review by this Court, foreign complaints under NAFTA and GATT will increasingly fuel constitutional claims against divestment and selective purchasing laws, "Buy American" laws, environmental regulations, and other state laws. These claims will sap the lawmaking powers of the States and unduly enlarge the role of the courts. The Court should grant certiorari to assess the effects of trade pacts and related federal laws on respondent's constitutional claims. *See Barclays*, 512 U.S at 324 & n.22, 326 (federal law may show that Congress has "implicitly permitted" state laws that affect foreign commerce; complaints by foreign countries do not establish unconstitutional interference with foreign commerce); *cf. Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (certiorari granted "because the cases involve important rights asserted in reliance upon federal treaty obligations").

C. The Constitutionality of Selective Purchasing Laws Has Not Been Decided by This Court, and a Split in the Circuits Now Exists on Whether the Market Participation Exception Applies to the *Foreign* Commerce Clause.

The Court has never decided the constitutionality of selective purchasing laws; the court below described the central issues in this case as "issues of first impression." Pet. App. 20. Although such laws concerning South Africa existed throughout this country (and the world) in the 1980s, no one challenged them in court. This Court denied review in a case sustaining a local *divestment* law: *Board of Trustees*, 562 A.2d at 740-757. In that case, the Maryland Court of Appeals upheld the Baltimore divestment ordinance against claims under the Supremacy, Foreign Commerce, and Foreign Affairs clauses -- the same clauses at issue here. This Court denied certiorari. 493 U.S. 1093 (1990). During the same period, the Court twice denied review in cases upholding so-called "Buy American" laws against similar claims. *See Trojan Technologies, Inc., supra, cert. denied*, 501 U.S. 1212 (1991); *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

The case repeatedly cited by the courts below -- *Zschernig v. Miller*, 389 U.S. 429 (1968) -- did not concern selective purchasing or divestment. In *Zschernig*, the Oregon statute at issue regulated the terms under which a nonresident alien could inherit property from an Oregon decedent. The state law prohibited inheritance by a nonresident alien unless three conditions were satisfied: (1) the alien's government must accord Americans the right to inherit on equal terms with its citizens; (2) the alien's government must give Americans the right to receive payment in the United States of funds from foreign estates; and (3) the nonresident alien must be able to receive "the benefit, use or control" of the proceeds of the Oregon estate "without confiscation" by his government. The Court concluded that this

type of probate law *as enforced in the Oregon courts* had "a direct impact on foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. The Court stressed that the extensive record of enforcement of the statute by the Oregon courts showed a "*great potential for disruption or embarrassment*" in the conduct of foreign relations: the Oregon courts had repeatedly criticized the administration of foreign laws by foreign officials, questioned their credibility, and denied foreign citizens private inheritances based on "foreign policy attitudes" toward particular governments. *See* 429 U.S. at 435 (emphasis added).

Zschernig did not overrule *Clark v. Allen*, 331 U.S. 503 (1947), which upheld the facial validity of a California statute similar to the first two sections of the Oregon law. Although the California statute in *Clark* was clearly designed to influence foreign countries to change their laws to allow Americans to inherit, the Court dismissed the constitutional claim against the law as "farfetched." *Id.* at 517. Emphasizing that "rights of succession" were peculiarly a matter of local law, the Court agreed that "[w]hat California has done will have some incidental or indirect effect in foreign countries" but concluded "that is true of many state laws which none would claim cross the forbidden line." *Id.*

Neither *Zschernig* nor *Clark* addressed the exercise of state spending powers -- only the regulation of private inheritances. The court below stated that the "precise boundaries" of *Zschernig* "are not clear[,]" and "subsequent Supreme Court holdings have done little to clarify the reach of the Court's holding" in that case. Pet. App. 20, 30; *see* Recent Cases, 112 Harv. L. Rev. 2013, 2016 (1999) (noting "two different and inconsistent approaches" used

by lower courts to "apply the *Zschernig* effects test"). No case of this Court addresses the intersection of foreign affairs, state spending, and international trade agreements. *Compare Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983); *Barclays*, 512 U.S. at 310-31 (all reviewing state taxation under the Foreign Commerce Clause).

The Court *has* addressed state spending in cases applying the market participation exception to the domestic Commerce Clause. The Court has made clear that "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983). The Court has reserved, however, the question whether the market participation exception to the Commerce Clause applies to claims under the *Foreign* Commerce Clause (*see Reeves v. Stake*, 447 U.S. at 438 n.9), and it has likewise never decided whether the exception applies to claims under the Foreign Affairs clauses. *See* 10 Op. Off. Legal Counsel at 50 n.4. ("Although the Court [in *Reeves v. Stake*] expressly reserved the question whether the market participation doctrine applies to the statutes that affect foreign, as opposed to interstate, commerce, we believe that the rationale for the distinction -- that the Commerce Clause was intended to restrict a state's ability to regulate but not its ability to participate in markets -- applies equally to statutes that affect foreign commerce."); 10 Op. Off. Legal Counsel at 63-64 (market participation doctrine should apply as well to claims under the federal foreign affairs power).

The decision below creates a split between the First and Third Circuits on whether the market participation doctrine

applies to the Foreign Commerce Clause. *Compare* Pet. App. 48-50 *with Trojan Technologies, Inc.*, 916 F.2d at. 909-13, *Board of Trustees*, 562 A.2d at 749-53 (quoting Laurence H. Tribe, *American Constitutional Law* § 6-21 (2d ed. 1988) at 469), and *K.S.B. Technical Sales Corp.*, 381 A.2d at 784-89.[1] The court below further stated its "disagree[ment]" with the decision of the district court in *Trojan Technologies, Inc.*, 742 F. Supp. 900, 902-03 (M.D. Pa.), *aff'd*, 916 F.2d 903 (3d Cir. 1990), "[t]o the extent that this case supports a market participant exception to the foreign affairs power" (Pet. App. 37n), and rejected the 1986 opinion of the Department of Justice (quoted above) on the same point. Pet. App. 37-38. The Court should grant the petition to resolve these splits of authority on the application of the market participation exception to the Foreign Commerce and Foreign Affairs clauses.

D. This Case Presents a Unique Opportunity to Resolve Questions Expressly or Implicitly Reserved by the Decisions in *Zschernig*, *Barclays*, and *Reeves v. Stake*.

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[1] The court below stated that "it is unlikely that the market participant exception applies to the foreign commerce clause" and expressly "decline[d]" to follow the three cases that have applied it to that clause. Pet. App. 48-49. Elsewhere the court stated that it "ch[o]se to leave" the "resolution" of this issue "to another day and another case." Pet. App. 50. The court's statements taken as a whole are sufficient to create a split of authority between the First Circuit and the Third Circuit and the state courts cited above.

"We deal here with the basic allocation of power between the States and the Nation." *Zschernig*, 389 U.S. at 443 (Stewart, J., concurring). In *Zschernig* and *Barclays* the Court addressed the constitutionality of certain types of state laws alleged to interfere with foreign commerce and foreign affairs. These cases, however, addressed only state taxation and regulation, not a proprietary activity such as state spending. Meanwhile, in the period between *Zschernig* and *Barclays*, the Court applied the market participant exception to state spending and stressed its roots in principles of federalism. *See Reeves v. Stake*, 447 U.S. at 441; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807-10 (1976). This case lies at the intersection of lines leading from *Zschernig*, *Barclays*, and the market participation exception. The case is a unique opportunity to join these lines in a decision that would clarify the authority of the States to take action that has indirect foreign effects.

"*Zschernig* remains the only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power of the federal government." Pet. App. 30. The case remains "a unique statement and a sole application of constitutional doctrine." Louis Henkin, *Foreign Affairs and the Constitution* (1996 ed.) at 165. The doctrine has been questioned and the result in *Zschernig* attributed to Cold War tensions. *See id.* at 162 ("until 1968, there was no hint of such a principle"); *id.* at 165 & n. ("relic of the Cold War"); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1641-64 (1997).

The decision in *Barclays* sparked new attention in *Zschernig*. In *Barclays*, the Court upheld the California

"worldwide unitary" method of taxing multinational corporations, relying on Congress's failure to preempt and the "implicit permission" that failure represented. *Id.* at 324, 326, 329. The Court noted that the Constitution allocates to Congress the power to establish uniformity -- to "speak with one voice" in matters affecting foreign nations -- when it wishes to do so. *Id.* at 329. Where, however, Congress had failed to nullify the state tax at issue, despite vocal attacks by the Executive Branch, *id.* at 328-29, and a "battalion" of foreign countries, *id.* at 320, 324 n.22, the Court determined that Congress had implicitly permitted the law and thus protected it from a claim that it interfered with the conduct of foreign relations.

Thus, under *Barclays*, express Congressional *approval* of a state law affecting foreign affairs is not required for the Court to hold a state law constitutional: while the federal government must have the "*capacity*" to "speak with one voice" on foreign affairs when the national interest so requires, "Congress may more passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential;' . . . it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminated against inter*state* commerce . . . ." *Id.* at 323 (emphasis added); *see also Dames & Moore v. Regan*, 453 U.S. 654, 682-83 & n.10 (1981).

Zschernig was not cited in *Barclays*, though it was cited in the briefs of both parties and in the oral argument of the United States as *amicus curiae* in that case. *See Barclays*, *supra*, 1993 WL 639306 (brief for petitioner), 1994 WL 135983 (brief for respondent), and 1994 WL 664950 at *13 (argument for United States). Commentators have understandably asked "whether

Barclays undercuts *Zschernig* or not." Pet. App. 33-35 & nn. 13, 14 (citing Goldsmith, *supra*, at 1700-01, and Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1848 (1998)). This petition squarely presents that question and an opportunity for this Court to address the interplay of *Zschernig*, *Barclays*, and the market participation exception. The Court should grant the petition and decide whether (1) the "implicit permission" found in *Barclays* may be shown by the later *enactment* of a non-preemptive federal law and (2) whether implicit Congressional permission forecloses constitutional claims under *Zschernig*. Finally, this selective purchasing case presents a unique opportunity to apply the market participant exception -- a doctrine firmly established by decisions of this Court -- to claims under the Foreign Commerce and Foreign Affairs Clauses.[2]

II. THE DECISION BELOW UNDULY EXPANDS *ZSCHERNIG* TO STRIKE STATE LAWS THAT HAVE NO DIRECT IMPACT ON FOREIGN AFFAIRS.

The court below conceded that "some degree of state involvement in foreign affairs is inevitable" and that "[i]n the governance of their affairs, states have variously and inevitably

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[2] For the reasons stated in Argument IV, below, the Court should also review the question whether the 1996 Federal Burma Law preempts state and local laws such as the Massachusetts Burma Law.

impinged on United States foreign relations." Pet. App. 18 (*quoting* Henkin, *supra*, at 162). The court accordingly stated the question as whether the Massachusetts law fell within "the boundaries of permissible state activity in the foreign affairs context." Pet. App. 18. In deciding this question, the court unduly expanded the holding of *Zschernig* to threaten state and local laws very different in kind and effect from the state law and actions involved in *Zschernig*.

The court below failed to grasp the key elements of state actions that directly interfere with foreign affairs. These elements are present in each of the state actions prohibited by Art. I, § 10, such as making treaties or declaring war. These actions were prohibited by the Framers because, as actions long associated with international sovereignty, they posed risks to the effective conduct of foreign affairs.

In contrast, the procurement of goods by a state government is not an aspect of international sovereignty. Whatever the intent of such a law, its center of gravity lies at home, not abroad. The court below misapplied *Zschernig* in invalidating a procurement law. Even if *Zschernig* enlarged the prohibitions on state conduct contained in Article I, § 10, the case must be read narrowly. By reading *Zschernig* broadly, the court below has subjected core state functions to *ad hoc* review of their international effects[3] and thus violated the principle that the "Constitution does not make

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[3] The breadth of the rule applied by the First Circuit deserves review by this Court. The court below deemed state interests irrelevant (Pet. App. 38-41) and adopted the view that the power of the national government over foreign affairs is not only plenary but exclusive and extra-constitutional. *Id.* at 38.

the judiciary the overseer of our government." *Barclays*, 512 U.S at 330 (quotation omitted). The decision thus should be reviewed by this Court.

III. THE MARKET PARTICIPATION EXCEPTION APPLIES TO THE FOREIGN COMMERCE AND FOREIGN AFFAIRS CLAUSES.

The Court should grant the petition and hold that the market participation exception applies to both the Foreign Commerce and Foreign Affairs clauses.

"When a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. at 208 (rejecting Commerce Clause challenge to City of Boston requirement that at least 50 percent of private workforce on all construction projects funded wholly by city must be Boston residents); *see Reeves, Inc. v. Stake*, 447 U.S. at 436-37 (upholding state law restricting sale of state-produced cement to state residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 810 (upholding state "bounties" for scrap cars under law favoring state residents seeking bounties). The "market participant" doctrine stems from the fact that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves, Inc. v. Stake*, 447 U.S. at 437. Indeed, in light of the "long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal,'" *id.* at 438-439 (quotation

omitted), the Court has reasoned that "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* The doctrine rests on a "healthy regard for federalism and good government" rooted in the powers reserved to the States by the Tenth Amendment. *Id.* at 441.

The court below "decline[d]" to follow the federal and state courts that have applied the market participant exception to claims against state and local selective purchasing laws under the *Foreign* Commerce Clause. *See* pp. 19-20, *supra*. This was error because the rationale for the exception -- that the Commerce Clause was intended to restrict a State's ability to regulate but not its ability to participate in markets -- applies equally to statutes that affect foreign commerce. *See id.*

The court below similarly erred in not applying the market participation exception to claims that state action interferes with the ability of the federal government to conduct foreign affairs. As the Maryland Court of Appeals noted, "[T]he concerns which underlie the foreign Commerce Clause are closely related to the concerns underlying the limits on a state's authority to affect foreign policy." *Board of Trustees*, 562 A.2d at 752. The close relation between the clauses shows that the foreign affairs power -- no less than the foreign commerce power -- must be analyzed to determine whether it was intended by the Framers to constrain the proprietary power of the States. *Cf. Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282, 289-91 (1982)(market participant doctrine does not apply to preemption analysis under NLRA because comprehensive statutory scheme reflects intent to foreclose certain state action, but Commerce Clause does not

itself interfere with power of States to contract freely in market). In the absence of any such original intent, there is no constitutional basis for a judgment against a state's exercise of proprietary power, absent valid preemption by Congress.

The historical basis for the plenary federal power over foreign relations does not establish an intent to displace state proprietary power. The Framers were primarily concerned with congressional control over the exercise of state *regulatory* power affecting foreign affairs -- particularly tariffs. *See The Federalist* No. 22, at 144 (C. Rossiter ed. 1961); *id.* No. 23 at 153. They also barred state actions -- such as treaties or declarations of war -- long associated with international sovereignty. Each of these restrictions was adopted at a time when the law affirmed the right of a government to decide with whom it would deal. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). In light of the historical basis for the federal foreign affairs power and nature of selective purchasing laws, this petition presents a unique opportunity to apply the market participant doctrine to claims under both the foreign affairs and foreign commerce powers. *See* 10 Op. Office of Legal Counsel at 63 ("We do not think the *[Zschernig]* principle should be extended to state proprietal action").[4]

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[4] In holding that the Massachusetts law represents regulation and not market participation, the decision below also conflicts with the decisions of this Court in *Reeves, White*, and *Alexandria Scrap*. *See* Pet. App. 41-47. Petitioners seek certiorari on this issue but do not address it further in this petition. *See* Question Presented No.2, *supra*, p. ii; *see also South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 101-103

IV. THE COURT BELOW APPLIED A "STRONG PRESUMPTION" OF PREEMPTION THAT CONFLICTS WITH THE PRESUMPTION AGAINST PREEMPTION CONSISTENTLY APPLIED BY THIS COURT.

Finally, the court below "reject[ed] Massachusetts's claim that Congress has permitted the law" and found instead "that Congress has preempted the law." Pet. App. 59. The Court should grant certiorari and reverse this judgment because it inverts the normal presumption of validity of state law and conflicts with *Barclays*.

The court below conceded that the Federal Burma Law contains no express preemption clause. Pet. App. 64. However, citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), it ruled that when "Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern." Pet. App. 69-70. This ruling inverts the presumption against preemption long applied by this Court and places on Massachusetts the burden of proving that Congress did *not* intend to preempt state and local laws on Burma.

This error should be reviewed by this Court. The historic

(1984)(Rehnquist, J., joined by O'Connor, J., dissenting)(Alaska law with foreign effects is market participation).

presumption against preemption applies equally to state laws governing purchasing decisions -- decisions deeply rooted in local affairs. The fact that selective purchasing laws also touch upon foreign affairs does not invert this settled presumption. *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938) ("Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."); *United States v. Pink*, 315 U.S. 203, 230 (1942)("Even treaties . . . will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this Nation unless clearly necessary to effectuate the national policy.").

The presumption of preemption applied by the court below flatly conflicts with *Barclays*.[5] *Barclays* "requires no more than legislative inaction to establish" Congressional permission for state laws touching foreign affairs. *Id.* (Scalia, J., concurring). If Congressional *permission* for such state action may be shown merely by inaction, *preemption* must -- at the least -- overcome a presumption of validity and rest on a clear statement of federal

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[5] The court below found that the evidence of Congressional permission in this case was weaker than the evidence in *Barclays*. Pet. App. 60-63. The court erred in devaluing the strong evidence of permission present here and absent in *Barclays*: the fact that Congress *later enacted a law on the same subject but did not expressly preempt state law*. In light of the court's statement that "it may be that the Massachusetts law was a catalyst for federal sanctions" (Pet. App. 73), the court should have found that Congress "whose voice, in th[e] area [of foreign affairs], is the Nation's" (*Barclays*, 512 U.S. at 331), implicitly permitted laws such as the Massachusetts Burma Law.

intent. The clear statement rule should apply to foreign as well as domestic affairs to ensure that state governments have fair notice that a proposed law might preempt state action. This Court should grant review to clarify the proper standard of judicial review for preemption claims in cases where state laws affect foreign affairs.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

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